IN THE EIGHTH CIRCUIT COURT OF APPEALS

CASE NO. 03-1134NE

PATTI BUTTS,

Plaintiff-Appellant,

vs.

CONTINENTAL CASUALTY COMPANY, ET. AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT OF NEBRASKA

Honorable Lori Smith Camp, District Judge

APPELLANT'S BRIEF

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff believes oral argument of 10 minutes each would be proper.

TABLE OF AUTHORITIES CITED

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the U.S. District Court for the District of Nebraska, Honorable Judge Lori Smith Camp, dated December 10, 2003. The lower court had jurisdiction over the matter pursuant to 28 U.S.C. 1331 and 1343 while this Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. The lower court erred in granting Defendant's motion for summary judgment.
2. The lower court erred in denying Plaintiff's motion for partial summary judgment.

STATEMENT OF THE CASE

Plaintiff filed a petition [JA 165-66] in state court to which Defendants removed [JA 167-68] and then answered [JA 169-70].

Both sides filed motions for summary judgment [JA171-74] with Plaintiff's motion being partial in nature while Defendants sought full relief.

Defendant's motion was granted while Plaintiff's motion was denied [Addendum]. Plaintiff thereafter timely filed this appeal.

STATEMENT OF FACTS

The following facts are not in dispute and that showing the facts in a timeline manner is the easiest way for the Court to understand the medical facts in the record:

1. That Plaintiff had a policy of long term disability insurance through her employer, Defendant Michaels Foods, Inc., which had been purchased from Defendant Continental Casualty Company. [JA 165-70] That the policy [JA144-166] referred to above has the following provisions:

   a. There is an 180 day elimination period such that benefits are not due and owing unless said disability continues past the elimination period. [JA144]

   b. "Disability" means either total or partial disability. [JA146]

   c. "**Total Disability**" means **continuously unable to perform the substantial and material duties of your regular occupation**, under the care of a licensed physician, **and not gainfully employed in any occupation** for which the insured is qualified by education, training or experience." [JA148]

   d. Plaintiff would be entitled to the monthly benefit for each month of Total Disability which continues after the elimination period. [Id.]

2. Plaintiff was under the care of several physicians [JA00001-133] and was not employed in any occupation for which the insured was qualified by education, training or experience after June 25, 2000. [JA000022 and 000026] [JA138-39]

3. That one of Plaintiff's additional treating physicians Dr. Meyer noted on **October 11, 2000** that Plaintiff had "abdominal pain" and "pain in the right hip", that the doctor was advising Plaintiff to have a "repeat ERCP…where they could do pancreatic manometry and

sphinterotomy or stenting if indicated"…"She has agreed to be seen at the Mayo Clinic"… [JA000061]

4. Dr. Trail's notes for **10/16/00** indicated: He advised Plaintiff to go to Mayos. That Plaintiff needs physical therapy until she gets "back to normal". Chronic pain in back, knot in left thigh (granuloma), and Dr Commock will be doing injections into her thigh and back. Pain radiates into the knee as well. [JA000082] Plan is to follow Plaintiff on as needed basis after she gets back from Mayos. [JA000083]

5. Physicians Statement by Dr. Trail (**10/16/00**): Advised Plaintiff to cease work on June 25, 2000, Plaintiff's current symptoms were back and recurrent abdominal pain, Plaintiff was sent to Dr. Myers on 10/11/00 and was referred to Mayos as further treatment required. [JA000096]

6. Plaintiff's physical therapist Lisa Huber's notes of **10/20/00**: "complains primarily in the central abdominal area. She is being referred to…Mayos for further follow up of this problem." Plaintiff at one point was sleeping in a bed but discontinued that because of pain "requiring her to sleep in her chair". Plaintiff is "unable to complete straight leg raising…requires assist to lift leg into bed"…"continue to complain of pain during ambulation". Goals set for Plaintiff on that date included being able to "tolerate 15 minutes on a treadmill at speed of 1.5 MPH" and acquire "ability to pick up item off of the floor". [JA000043-4]

7. Plaintiff's physical therapist Lisa Huber's notes as of **10/25/00**: Plaintiff "reports more pain in the abdomen area", that Plaintiff will be getting call from Mayos due to pain, Plaintiff "will be getting a second injection in her left thigh this AM might be due to continued pain in her leg as well…which Dr. Myers feels may be pancreas related". "Did not tolerate

exercise well"…"Question if patient would be better managed to wait until after she is more medically ready". [JA000041]

8. Plaintiff's physical therapist Lisa Huber indicated that as of **11/3/00**: "She saw Dr. Commock again who felt that should not do anything at all with exercise until after she sees the physician at Rochester". [JA000042] Copy sent to Dr. Trail. [JA000045]

10. Plaintiff's statement (**11/6/00**): Unknown when would return to work. Physical therapy treatment with Lisa Huber on hold until Plaintiff was to get back from Mayos. [JA000097]

11. Physical Demands Analysis (**12/1/00**): Lists what Plaintiff's former job required in terms of standing, walking, sitting, pushing, pulling, lifting and carrying. [JA000087-88]

12. Mayo Clinic Consult report dated **12/4/00** indicated: "Patient did well until about June of this year….since that time she has had the same abdominal pain she had prior"…."the pain she described is epigastric radiating to the back"….several current medications including Premarin, Prilosec, Diflucan, Valium, and Loprox…."she has difficulty staying asleep"…with the Plan as to proceed with surgery "if pancreatic pressures are high", or if not, then "consideration must be made for pain management". [JA000067-8]

13. Mayo Clinic Hospital Summary dated **12/4/00** indicated: "abdominal pain which has been present since last June"… tender to palpation…[JA000069] as well as a Mayo Clinic Radiology report dated **12/4/00** indicated: Recurrent abdominal pain [JA000071] as Plaintiff then had a sphinterotomy on **December 4, 2000**. [JA00007]

14. Plaintiff was released from Mayos on **December 5, 2000** and was "stable to transfer or discharge. Functional status one." [JA 000070]

15. FAX from Gloria Tighe, Plaintiff's former supervisor at work, on **12/5/00** with

report attached from Dr. Trail: Plaintiff can return to work once cleared by Mayos. [JA000085]

16. Defendant's note of **December 8, 2000** indicates conversation with PDA with respect to Plaintiff's job description and related physical requirements. [JA000012-13]

17. That the following information was obtained by Defendants from Plaintiff on **12/26/00**: "Mid-abdominal epigastric pain with occasional exacerbations and spasm…hip and leg pain…pain is controlled with Darvocet and by sleeping in a recliner…" [JA00006]

18. Claimant interview on **12/26/00**: Still ill and not feeling better. Went to Mayos on December 4-5, 2000. Not feeling better at all. Cannot sleep in bed because of pain she has all the time. Has not driven since July 9, 2000. Clothes herself by leaning up against a wall. In constant pain 24 hours a day. Dr. Trail said there was nothing more he could do for her. Will be going back to Mayos so that Dr. Barron can "start from scratch" to try and find cause of the pain. [JA000079]

20. Plaintiff's treating doctor Dr. Trial told Defendants in a phone conversation on **January 4, 2001** that Plaintiff has "acute, possibly congenital, problems in her abdomen", that Plaintiff is in a "deconditioned state from ongoing physical problems and that physical therapy is necessary", "it is reasonable that EE [Plaintiff] should not be driving". Defendant's notes indicate that Doctor added that "since he had not seen EE in a month it was difficult to determine job capability or further limitations/restrictions at this time." [JA000011]

21. Claimant interview on **1/4/01** indicated: Pain in abdomen and right hip. Has appointment at Mayos on 1/10/01 to test why Plaintiff is still experiencing pain. Still on Darvocet every 4 hours. Unable to drive by directive of Dr. Trial. [JA000078]

22. Dr. Commock of the Mayo Clinic reported to Defendants on **January 8, 2001** that if Plaintiff was still having pain that he would do a further evaluation. [JA000010]

23. As of **January 10, 2001**, Plaintiff was in pain and was also being prescribed medications including Premarin, Loprox and Darvocet. [JA00009] The pain "required emergency room intervention with pain injection for relief" [Id.]

24. That Plaintiff attended physical therapy on **January 10, 2001** "as ordered" and that Plaintiff complained of pain when doing exercises. [JA000010]

25. Mayo Clinic Consult report dated **1/10/01** indicated "Chief Complaint" was "abdominal pain"…developed a perforation in July 2000…after discharge had "chronic pain with intermittent bouts of more severe pain"…"seen here in early December"…"has continued to have bouts of abdominal pain afterwards…her **pain complexes are apparently worse than ever**"…"she had had to go to the emergency room for these for a shot of Demerol"…"She does have pain on movement"…"She has rather diffuse back and joint pain"…"current medications include Premarin, Loprox and Darvocet". …"there is tenderness along the right side of her abdomen"…"she will get a CAT scan of her abdomen and pelvis…she will also get an intestinal transit study and a small bowel x-ray". [JA000052]

26. Mayo Clinic notes dated **1/12/01** indicated "PAIN"… [JA000049]

27. Mayo Clinic notes dated **1/15/01** indicated "PAIN"…[Id.]

28. That ***Defendants "agreed to accept liability" on*** **January 19, 2001 noting that "medical evidence supports".** [JA00003]

29. That Defendants' note on **January 19, 2001** noted that "as of 1/4/01… [Plaintiff was] deconditioned and driving not advised". [JA00006]

30. That **Defendants made their initial denial decision on January 29, 2001** solely due

to the elimination period allegedly not being met [JA00030-31] expressly mentioning certain negative test results but there was no mention of the physical demands of Plaintiff's job or any mention of anything related to Plaintiff's restrictions (or lack thereof).

31. That Plaintiff's treating doctor Kynan Trail wrote a letter to Defendants dated **February 19, 2001** which set forth that Plaintiff had been in a "debilitated state" for 8 months as of that date and could not be gainfully employed as of that date. [JA000026]

32. That Defendants received Plaintiff's appeal in **March 2001**. [JA000024-25]

33. That Plaintiff's treating doctor Kynan Trail wrote a letter to Defendants dated **March 9, 2001** which set forth that Plaintiff was operated on again on February 27, 2001 and that Plaintiff would be able to be gainfully employed once her hip pain was resolved as well as that Plaintiff would be starting physical therapy in the near future to aid in her recovery. [JA000022]

34. Defendants had copies of these letters from Dr. Trail provided to them [JA000022 and JA000026] prior to making the **final decision on April 19, 2001**.

35. Defendant denied Plaintiff's appeal on April 19, 2001 by listing the physical demands of Plaintiff's jobs and then by claiming that "the medical records do not substantiate your client's inability to perform her occupation past the elimination period….We have already advised that as of October 25, 2000, your client was capable of performing her own occupation without **restrictions**."….your client was not unable to return to her occupation based on the medical records prior to the end of the elimination period on December 24, 2000." [JA000018-19]

36. That Defendants asserted that Plaintiff could not perform essential job functions until October 25, 2000 and that Plaintiff had "documented decreased functionality postoperatively until 10/25/00." [JA00005]

37. That there was no medical evidence in the claims file from any doctor suggesting that Plaintiff could perform essential job functions after October 25, 2000 and through the last entry in the claims file dated 3/13/01 [JA00001-133]

38. That Plaintiff's treating doctors never gave any opinions that Plaintiff could perform the alleged physical requirements of the position being standing and walking for 1 hour at a time for 4 hours, lifting 1-2 pounds for 20 times a day, and 3-10 pounds for 7 times a day. [Id.]

39. That Plaintiff was not allowed to submit additional evidence after the final appeal decision which finally set forth specific reasons for denial of the claim. [JA000015]

40. Employer Statement stated Plaintiff had not worked since disability began on June 24, 2000. [JA000095]

41. Plaintiff has been unable to return to her job since June 24, 2000 or perform any job outside the home since being discharged from the hospital on July 11, 2000. [JA000021 and JA000026] [JA 134-35]

42. That Plaintiff's supervisor Gloria Tighe personally observed Plaintiff after she stopped working for Defendant Michael's Food's Inc. d/b/a M.G. Waldbaum Company and concluded that Plaintiff could not have walked up and down the aisles in the poultry house and pulled dead birds and climbed up and down ladders and performed other duties that were part of Plaintiff's job description. [JA 136-137]

43. That Plaintiff's supervisor Gloria Tighe personally informed someone from Defendant's insurance carrier CNA that she had seen Plaintiff on different occasions and informed CNA regarding Plaintiff's medical condition, Plaintiff's inability to perform her job duties, and that Plaintiff could no longer perform the job that Plaintiff was hired to do. [Id.] No

mention of Gloria Tighe's reports to CAN of Plaintiff's inability to work are reflected anywhere in the claims file. [JA 1-133]

44. That even as of **July 2002**, Dr. Trail continues to be one of Plaintiff's treating doctors, that Plaintiff has not returned to gainful employment as the result of complications from surgery in July 2000, and does not know if Plaintiff will ever be able to return to gainful employment. [JA 134-35]

SUMMARY OF ARGUMENT

I. De novo on the record is the proper standard of review. Barnhart v. UNUM Life Ins. Inc., 179 F.3d 583 (8th Cir. 1999); Walke v. Group Long Term Disability Insurance, Slip Op. (June 19, 2001. 8th Circuit)

II. Plaintiff's treating doctor's opinions are entitled to great deference. Donaho v. FMC Corp., 74 F.3d 894, 901 (8th Cir.1996) Any nurses' opinions are inadmissible. 71-1712 Neb. Rev. Stat. (1998 Reissue) in pari materia with 71-1,132.05 Neb. Rev. Stat. (1998 Reissue).

III. There are five factors to be typically applied in ERISA cases, namely 1) Whether the defendant's interpretation was consistent with the goals of the Plan, 2) Whether the interpretation renders any language in the Plan meaningless or internally inconsistent, 3) Whether the interpretation conflicts with the substantive or procedural requirements of ERISA, 4) Whether the defendant has interpreted the relevant terms consistently and, 5) Whether the interpretation is contrary to the clear language of the Plan.. Finley v. Special Agents Mut. Benefit Ass'n, 957 F.2d 617, 621 (8th Cir. 1992).

IV. In denial of benefit situations the "plan administrator **MUST** `set forth the rationale underlying its decision so that the claimant may adequately prepare an appeal to the federal courts, and so that a federal court may properly review…the decision.'" McGarrah v. Hartford Life Insurance Company, Case No. 00-1376 (8th Cir. 12/11/2000); citing Collins v. Central States, S.E. & S.W. Areas Health & Welfare Fund, 18 F.3d 556, 561 (8th Cir. 1994). See also, 29 U.S.C. 1133(1).

ARGUMENT

I. THE LOWER COURT PROPERLY APPLIED A DE NOVO STANDARD OF REVIEW AND THUS THIS COURT SHOULD APPLY A DE NOVO ON THE RECORD STANDARD OF REVIEW.

The lower court concluded [Addendum at 8] that the Plan did not contain a clear delegation of discretionary authority and thus applied a de novo review of this matter.

The lower court also noted that a de novo standard of review was proper because of a "potential conflict of interest". [Id. at 9]

Further, once the lower court concluded that the de novo standard of review was proper, the lower court additionally found "good cause" to allow the additional evidentiary materials submitted by the Plaintiff. [Id. at 10]

It is important to note that Defendants have not cross-appealed any of these procedural rulings and thus they become the law of the case.

By virtue of the lower court applying a de novo standard of review, that necessarily implies that this Court apply a de novo on the record analysis which effectively renders the substantive analysis by the lower court a nullity and leaves this Court free to make its own ruling on the case at bar. Walke v. Group Long Term Disability Insurance, Slip Op. (June 19, 2001. 8th Circuit).

II. THIS COURT SHOULD GRANT PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENY DEFENDANTS' MOTION FOR SUMAMRY JUDGMENT.

Defendants own statements in the claim file [001-133] admit the following:

1. That Plaintiff was disabled beginning June 24, 2000. [Statement of Facts #2,5,40-41,44]
2. That Plaintiff was disabled for purposes of the underlying policy until at least October 25, 2000. [Statement of Facts #35-37]
3. That the policy involved in the case at bar requires that Plaintiff prove the following to collect benefits under the policy [Statement of Fact #1]:
    a. That Plaintiff be continuously disabled for at least 6 months.
    b. That Plaintiff was under the care of a licensed physician and;
    c. That Plaintiff was not gainfully employed in any occupation for which the insured is qualified by education, training or experience.
4. That Plaintiff was under the care of several licensed physicians for at least 6 months starting on June 24, 2000. [Statement of Facts #2-18]
5. That Plaintiff was not gainfully employed in any occupation for which she was qualified by education, training or experience after June 24, 2000. [Statement of Fact #2]

The one and only issue in this case for this Court to resolve, for purposes of the instant motion as well as for the case overall should the matter proceed to trial, is whether Plaintiff was disabled after October 25, 2000 and until the elimination period ran out on December 24, 2000.

As noted above, Plaintiff must prove 6 months of continuous disability but since Defendant admits the disability for the first 4 of those months, the only question then relates to the last 2 months, or from October 25, 2000 to December 24, 2000.

A. There are no facts suggesting that Plaintiff was not continuously disabled from October 25, 2000 to December 24, 2000.

The relevant medical records in the claims file are summarized in terms of a timeline found below but Plaintiff thinks it is important to not only understand what is in the claims file as of October 25, 2000 when Defendant claims Plaintiff could have returned to work but also to examine the medical records in the two weeks just prior to that date so that the Court can better understand Plaintiff's entire medical situation as of October 25th. The timeline is as follows:

1. **10/11/00:** Dr. Meyer advises Plaintiff to have a repeat ERCP because of the hip and abdominal pain and notes that Plaintiff agrees to go to Mayos for this. [JA 000061]
2. **10/16/00:** Dr. Trail also advised Plaintiff to go to Mayos for further treatment, that he advised Plaintiff to cease work on 6/25/00, and that she would need physical therapy until she "got back to normal". [JA 000082-86]
3. **10/20/00:** Physical therapist Lisa Huber noted that Plaintiff could not sleep in a bed, that Plaintiff was unable to complete straight leg raising, required assistance to lift leg into bed, "pain during ambulation", and that the **goals** set for Plaintiff on that date was to tolerate 15 minutes on a treadmill at 1.5 MPH and to "acquire the ability to pick up item off of the floor." [JA 000043-44]
4. **10/25/00:** Physical therapist Lisa Huber noted that Plaintiff had "more pain in the abdominal area", that Plaintiff will be getting a second injection in her left thigh, and that Plaintiff will be getting a call from Mayos about the pain. Huber noted "question if patient would be better managed to wait until after she is more medically ready". [JA 000041]
5. **11/3/00:** Dr. Commock felt Plaintiff "should not do anything at all with exercise until after Plaintiff sees the physician at Mayos." [JA 000042]

6. **12/4/00**: Plaintiff hospitalized at Mayos for a sphinterotomy due to abdominal pain present since last June. [JA 000067-71]

7. **12/5/00**: Dr. Trail writes to Defendants that Plaintiff could return to work **if** cleared by Mayos. [JA 000085]

8. **1/4/01**: Dr. Trail noted that Plaintiff has acute condition in her abdomen, that Plaintiff was in a "deconditioned state" requiring physical therapy, and that Plaintiff should not be driving. [JA 000011] Plaintiff noted on that same day that she is still in pain and has appointment at Mayos on 1/10/00. [JA 000078]

9. **1/8/01**: Dr. Commock of Mayos said he would do further evaluation with Plaintiff if Plaintiff was still having pain. [JA 000010]

10. **1/10/01**: Plaintiff still in pain and had required emergency room intervention with pain injection for relief. Plaintiff also attended physical therapy and was in pain during exercise. Mayos reported that Plaintiff's "pain complexes are apparently worse than ever" so Mayos prescribed a CAT scan of her abdomen and pelvis, an intestinal transit study, and a small bowel x-ray." [JA 000010 and JA 000052]

11. **1/19/01**: Defendants agreed to accept liability in this case noting that as of 1/4/01 that Plaintiff was "deconditioned and that driving was not advised." [JA 00003]

This was the state of the file as of **1/29/01** when Plaintiff's claim was denied by Defendants asserting that the elimination period had not been met. [JA 000002] but with no explanation of the specific reasons for that assertion.

Plaintiff appealed and Defendant's procedures allow a claimant to submit additional medical information as part of the appeal. Thus, Plaintiff additionally submitted the following:

1. **2/19/01**: Dr. Trail wrote Defendants noting that Plaintiff had been in a debilitated

state for 8 months and still could not work as of that date. [JA 000026]

2. **3/9/01:** That Plaintiff's treating doctor Kynan Trail wrote a letter to Defendants which set forth that Plaintiff was operated on again on February 27, 2001 and that Plaintiff would be able to be gainfully employed once her hip pain was resolved as well as that Plaintiff would be starting physical therapy in the near future to aid in her recovery. [JA 000022]

Despite this additional information, Plaintiff's appeal was denied on April 19, 2001. [JA 000018]

B. Every doctor indicated that Plaintiff was disabled for at least 6 months.

If one reviews the claims file, there is no doctor who ever released Plaintiff back to work at any time after she initially went off work starting on June 24, 2000.

In addition, it is clear that Plaintiff's medical condition was much worse as time went on and did not get better especially around the October 25, 2000 date that Defendant clings [JA 000018] to.

On October 11th, Dr. Mayer noted Plaintiff needed to have the ERCP procedure redone and was going to go to Mayos to do this. Dr. Trail advised Plaintiff on October 16th to go to Mayos and to continue the physical therapy. On October 20th, the physical therapist noted that Plaintiff has to sleep in a chair, cannot raise her leg, and **one goal for Plaintiff on that day was to acquire the ability to pick an item up off the floor.**[1] And on the key date of the 25th itself, the therapist is questioning if Plaintiff might be better off to wait until she is more medically ready to continue therapy.

[1] Contrast this "goal" with the actual physical requirements of the job [JA 000012-13] which required "pull dead bird 50 times a day a distance of one foot…additional pulling of a wheelbarrow for 300 feet…lifting of 1-2 pounds and carrying a distance of 5 feet…done 30 times daily. Additional lifting of 3-10 pounds of dead birds from the floor for 300 feet is required 7 times per day." Plaintiff cannot even lift any item off the floor as of October 20th but Defendant thinks she was able to work as of October 25th?

With all due respect to Defendant, there is no medical evidence in the claims file suggesting that Plaintiff could go back to work as of October 25th or at any time since June 2000. In fact, the only inference from the medical evidence is that Plaintiff was less close to returning to work on October 25th than at any point since she originally stopped working in June 2000.

And then when one considers the remainder of the medical evidence after October 25th, a similar picture emerges.

In November, Plaintiff was advised by Dr. Commock to do no exercising until she went to Mayos in December. [JA 000042 and JA 000045]

Once December 4th arrived, Plaintiff was operated on at Mayos. [JA 000067-71] The next evidence in the file of a medical nature is on December 26th where Plaintiff was not feeling better at all, that she was **in constant pain 24 hours a day, that she had to lean against a wall to clothe herself, that Dr. Trail advised that there was nothing more medically that he could do for her, and that Dr. Barron at Mayos was going to start from scratch to try and find the cause of the pain.** [JA 000079]

A few days after that on January 4th, Dr. Trail further indicated that Plaintiff should not be driving, that Plaintiff was in a "deconditioned state" needing physical therapy, and that Plaintiff's problems were "acute, possibly congenital". [JA 000011]

By January 10th, Plaintiff was back at Mayos again with her pain "apparently worse than ever" and that Mayos then ran a CAT scan, an x-ray and an intestinal study. Clearly, Mayos was no closer on January 10th to understanding Plaintiff's disability than it was back in December when it performed the surgery. And it is also clear that Plaintiff's doctors in October were not solving the problems either which is how Plaintiff got to Mayos in December. [JA 000052]

Not only was Plaintiff never released to go back to work and no doctor ever gave the opinion that Plaintiff was capable of doing her job after June 2000, but her medical condition deteriorated over time which necessitated Mayos intervention in December and January.

III. PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

As an initial observation, Defendant "agreed to accept liability" on January 19, 2001 and the notes as of that day taken by Defendants indicated that "as of 1/4/01…Plaintiff was deconditioned and driving not advised." [JA 000003]

Despite that admission of January 19th, Defendants 10 days later denied the claim saying that the "elimination period had not been met." [JA 000002]

A. Defendants' dual changes in position are not explained by any medical evidence such that a less deferential standard of review should apply to the extent that this Court should disregard the standard of review question and assess this case as a breach of fiduciary duty case.

The only medical evidence in the claims file between January 19th and 29th is the note [JA 00006] of the 19th reviewing the medical evidence on January 4th. Nothing new took place or was reviewed between the 19th and 29th which would justify any change in position.

Just as importantly, Defendants changed their basis for denying the claim between their initial denial [JA 000030-31] of the claim and their denial [JA 000018-19] of Plaintiff's appeal.

The initial denial mentioned certain negative intestinal and abdominal test results which had nothing to do with Plaintiff's ability to do or not do her job and there was further no mention of the specific physical demands for Plaintiff's job in that denial nor any mention that Defendants could not find any restrictions on Plaintiff during the elimination period. However, the denial of the appeal [JA 000018-19] specifically mentions the physical demands of Plaintiff's prior job as well as expressly mentions a lack of restrictions upon Plaintiff. Thus, Defendants

changed their position for denying the claim from focusing on negative medical test results to the focusing on an alleged ability to perform the job.

When one considers the Plan's language, as noted in Statement of Fact 1©, that Plaintiff had to prove that she was continuously unable to perform the functions and duties of her regular occupation, it is clear that the initial denial letter did not address that question at all and simply recited certain negative intestinal and abdominal test results to justify the denial.

When such serious procedural irregularities exists such as accepting liability then changing positions just 10 days later with no medical evidence to justify such a change as well as changing positions with respect to the basis for denying the claim, then a less deferential standard of review usually applies. See, Barnhart v. UNUM Life Ins. Inc., 179 F.3d 583 (8th Cir. 1999).

In James Stumpf v. Stetson Building Products et al, Case No. 8:99CV185 (Order of 9/14/01 at p. 12) the Court held that "the uncontroverted evidence also shows that procedural irregularities (failure to provide written notice, **changing reasons for denial**, …) tainted the process." The Court then went on and then and held that "the court requires substantial evidence, bordering on a preponderance, to support the Plan Administrator's decision." Id. The court finally then held that because of the above reasons, the "court need not analyze the evidence under the less deferential standard, however, since even under the less deferential standard, the court finds Stetson's decision to deny benefits is a breach of fiduciary duty."

This Court should follow the lead of the Court in Stumpf and apply a substantial evidence standard to Defendant, and similarly also find a breach of fiduciary duty.

B. The absence of any doctor stating that Plaintiff could return to work and/or perform the functions of her job means that Plaintiff's treating physicians statements are entitled to conclusive weight.

There is nothing in the claims file to evidence that Defendants ever had a doctor review this file or ever gave any opinions to Defendant which were adverse to Plaintiff.

Even had Defendants had an outside physician review the file, Plaintiff's treating doctor's opinions would have been entitled to greater deference. Donaho v. FMC Corp., 74 F.3d 894, 901 (8th Cir.1996).

If Defendants' position is going to be that they had a nurse review this case, any opinions by a nurse as to Plaintiff's medical condition and capabilities would not even be admissible in any event since nurses are not allowed to perform the same functions as are doctors. See, 71-1712 Neb. Rev. Stat. (1998 Reissue) in pari materia with 71-1,132.05 Neb. Rev. Stat. (1998 Reissue). For example, nurses cannot operate or order that an operation be performed so a nurse lacks the competency to offer opinions so as to negate Plaintiff's treating doctors' opinions that she needed surgery or needed to be evaluated to see if surgery was appropriate at Mayos as Dr. Meyer prescribed on October 11th (thought the surgery did not take place until December 4th).

Even if the Court might think that a nurse could offer testimony under either Rule 701 (lay testimony) or Rule 702 (expert), certainly the Donaho rule would apply with even greater force to Plaintiff's multiple treating physicians' opinions that Plaintiff could not work as opposed to a possible nurse reviewing the file.

It appears that this might be a case of first impression in one respect which is that Defendants are apparently going to assert that their nurse reviewed the file. To the extent that this is a case of first impression on the treating doctors versus a reviewing nurse, Plaintiff would

ask that the Court take Donaho and the cited Nebraska statutes to their logical conclusion which is that the treating doctors' opinions are entitled to absolute weight against reviewing nurses.

Thus, since Defendant has no admissible medical evidence contrary to the statements of Plaintiff's treating doctors, then Plaintiff is entitled to judgment as a matter of law.

C. In the event that the Court does not find that the earlier analysis does not entitle Plaintiff to judgment as a matter of law, then the Court's assessment of the 5 traditional factors should lead to that result.

Our Circuit has noted that there are five factors to be typically applied in these types of cases. In Finley v. Special Agents Mut. Benefit Ass'n, 957 F.2d 617, 621 (8th Cir. 1992), those factors were held to be: 1) Whether the defendant's interpretation was consistent with the goals of the Plan, 2) Whether the interpretation renders any language in the Plan meaningless or internally inconsistent, 3) Whether the interpretation conflicts with the substantive or procedural requirements of ERISA, 4) Whether the defendant has interpreted the relevant terms consistently and, 5) Whether the interpretation is contrary to the clear language of the Plan.

Whether the Defendants' interpretation was consistent with the goals of the Plan

The Plan states [JA 000063] that the Plan will be interpreted "in the interest of you and other plan participants and beneficiaries" but no other Plan Goals were stated therein.

Changing positions between January 19th to 29th without any medical justification would violate this goal.

Whether the interpretation renders any language in the Plan meaningless or internally inconsistent

The claims denial procedure [JA 000062] indicates that Plaintiff would be given "specific reasons for the denial", "reference to the specific plan provisions upon which the denial is

based", a description of any additional information you might be required to provide and an explanation of the Plan's review procedure.

It also indicates that the appeal decision "will include **specific reasons for the denial as well as specific references to the pertinent plan provisions** on which the decision is based." [Id.]

There is no question that the initial denial [JA 000030-31] fails to meet this standard since it essentially only says that the "elimination period" had not been met citing only certain negative intestinal and abdominal tests which do not relate to Plaintiff's ability to perform her job. Such initial denial might arguably meet the "pertinent plan provision" requirement by referring to the plan provision concerning the elimination period, but not the "specific reason" standard since such gives Plaintiff no notice of what specific factual issues related to Plaintiff's ability to perform her job to address in the appeal; which would then become part of the claim file for filing with this Court.

Whether the interpretation conflicts with the substantive or procedural requirements of ERISA

Defendants' interpretation conflicts with 29 USC 1001 which requires that the Plan be interpreted in accordance with the interests of the employees such as Plaintiff.

Keep in mind that Defendants initially agreed on January 19, 2001 to accept liability for this claim with no basis in the medical evidence to support a change in position. In such a case, changing positions violates 29 USC 1133 as changing the reasons should be held to not be "adequate notice". Further, the initial notice to Plaintiff denying the claim [JA 000030-31] denying the claims would also violate this statute as the references to not "meeting the elimination period" and to the negative test results did not properly appraise Plaintiff of the key

issue under the policy, namely what facts Defendants might be relying upon to negate the inference that Plaintiff could perform the functions of her job.

Whether the defendant has interpreted the relevant terms consistently

Defendants cannot point to any similar claims being handled in a similar way. Thus, this factor does not benefit Defendants in any way.

Whether the interpretation is contrary to the clear language of the Plan

Defendants' interpretation would render meaningless the definition of disability [JA 0000148] with respect to it including both total disability and partial disability since both are covered events under the plan.

Plaintiffs would ask that after considering all five factors that this Court find that Defendants' denial was arbitrary and capricious.

D. Defendants' failed to provide an appropriate initial written explanation of denial of the claim because it did not address the question of whether Plaintiff could perform her job duties and what evidence or facts Defendant might rely upon to come to that conclusion.

There is no doubt that Plaintiff properly followed the Plan's processes for making a claim, properly appealed, and that the Defendants never provided an initial notice [JA 000030-31] to Plaintiff of the specific reasons[2] for the denial of her claim related to the policy provision concerning the ability of Plaintiff to perform her job until the denial of her appeal. [JA 000018-19].

The case law is clear that in denial of benefit situations the "plan administrator **MUST** `set forth the rationale underlying its decision so that the claimant may adequately prepare an appeal to the federal courts, and so that a federal court may properly review…the decision.'"

[2] See, supra at 21 for the discussion of Defendants' failure to discuss any facts related to whether Plaintiff could perform her job in the initial denial of the claim. [JA 000030-31]

McGarrah v. Hartford Life Insurance Company, Case No. 00-1376 (8th Cir. 12/11/2000); citing Collins v. Central States, S.E. & S.W. Areas Health & Welfare Fund, 18 F.3d 556, 561 (8th Cir. 1994). This is required under 29 U.S.C. 1133(1).

The problem with the initial denial [JA 00030-31] is that its lack of specificity dupes Plaintiff into not knowing what to submit in support of the appeal. And thus when the final decision [JA 000018-19] comes out and gives a specific reason (i.e. lists the physical demands of the job as well as mentions the alleged absence of restrictions in the medical records), Plaintiff lost the opportunity to have information placed in the record for purposes of the Court's review. And this is not simply a matter of form over substance because, as noted in Dr. Trail's affidavit [JA 135], that doctor "still holds to the opinion" that Plaintiff has been unable to work since June 2000. In essence, if the initial denial had discussed the physicals demands of the job as did the denial of the appeal or mentioned that Defendants believed there was not adequate proof of restrictions, information such as is contained in this affidavit would have been forthcoming; in the event that the other medical evidence in the file did not already prove Plaintiff's inability to do her job.

There is no option for Plaintiff to file a second appeal to address the new issues which were raised in the second denial letter [JA 000018-19] such as the physical demands of the job and the issue related to restrictions. Thus, Plaintiff was placed in the unenviable position of being baited and switched in that since Plaintiff perceived the medical issues in a given way after the initial denial letter, Defendant was then free to go off in another direction while making its last decision with Plaintiff having no recourse since there is no second appeal. Thus, the failure to provide appropriate initial specific reasons related to an alleged ability to perform her job as was

done in the final decision amounts to a denial of due process and is an independent reason for granting Plaintiff's instant motion.

As a matter of law, Plaintiff's instant motion must be granted for Defendants' failure to provide proper written notice of their initial reasons for denial and then changing its positions[3] thus effectively foreclosed any meaningful right to appeal by sending information during the appeal such as contained in Dr. Trail's affidavit [JA 135] which effectively foreclosed this Court's ability to review all of evidence which might have existed had Defendant complied with both the Plan's language (i.e. "specific reasons") and the federal law cited above.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment should be granted and Defendant's Motion for Summary Judgment denied.

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CERTIFICATE OF COMPLIANCE

This brief complies with all type and volume limitations required under Fed. R. App. P. 32(a) (7) (A) and that this brief was prepared using Word, version 7.1 with Times New Roman 12 pt. Type and is virus free as it was scanned by McAfee just before being removed to disk.

By:\s\Michael B. Kratville #18255

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was emailed to Defendants' counsel Scott Laughtenbaugh on this 10th day of March, 2003.

By:\s\Michael B. Kratville #18255

[3] From citing negative test results in the initial denial to discussing the physical demands of the job and the alleged lack of restrictions in the medical evidence.